United States Senate

WASHINGTON, DC 20510

IMPEACHMENT TRIAL COMMITTEE
DISPOSITION OF PRETRIAL ISSUES
FOURTH ORDER

Upon consideration of the submissions of the parties and after hearing from them at the pretrial conference of May 18, 1989, the chair, in consultation with the vice chair, issues the following rulings on behalf of the committee:

Stipulations

Senate Resolution 480 of the 100th Congress, which was agreed to on September 30, 1988, requested the parties to work together to stipulate to evidentiary matters that are not in dispute and to report to the Senate on the stipulations to which they had agreed. On December 15, 1988, the House served proposed documentary and factual stipulations. On February 20, 1989, the parties reported to the Senate that they had reached no agreement on any stipulations.

On January 17, 1989, by which time it may have become apparent that a voluntary stipulation process would not be productive, the House proposed that the Senate "adopt a rule that would hold that any proposed stipulation of fact filed with the Senate by a party to this proceeding will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation of fact should not be taken as true." The House also requested that the Senate "adopt a parallel rule addressing

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the authenticity of documents, which would establish that any proposed stipulation regarding the admissibility of a document filed with the Senate by a party to this proceeding will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation should not be taken as true." Response of the House of Representatives to the December 12, 1988 Letter from the Senate Committee on Rules and Administration, at 2-3.

On March 31, 1989, the House renewed its proposals on admissions concerning facts and documents, and resubmitted its stipulation of facts in revised form. In a filing with the committee on April 2, 1989, Judge Hastings stated his opposition to the House's proposals for stipulations prior to trial. A Further Memorandum on Pre-Trial and Trial Procedures Necessary for a Trial that is Fair to Respondent, at 31-32.

The committee heard oral argument by the parties on April 12, 1989, and issued its first order on pretrial issues on April 14, 1989. In that order, the committee adopted the House proposal that any proposed stipulation of fact be accepted as true unless the opposing party files an objection, including a proffer as to why the proposed stipulation should not be taken as true. A like rule was adopted for the stipulations as to documents. By its second order, dated April 21, 1989, the committee extended to May 17, 1989 the date for the filing of Judge Hastings' response to the House

stipulations. The second order also extended until May 17, 1989, the date for Judge Hastings to file his own stipulations, which, like those of the House, would be accepted as true unless a specific objection was filed. Judge Hastings chose not to file his own stipulations.

Judge Hastings' Response to Stipulations Proposed by the House, which was received by telecopy on May 18, 1989, does not comport with the committee's order. Judge Hastings has in large part failed to respond to the stipulations proposed by the House. Although his response makes certain generalized objections, a few specific objections, and several generalized concessions, the committee in most cases is unable to determine Judge Hastings' position with respect to particular House stipulations. Instead, Judge Hastings, without having asked the committee to reconsider the April 14, 1989 order at any time between its issuance and the May 17, 1989 date for compliance, argues that he should not be required to take part in this process of identifying those matters that are not truly in contest. While the committee appreciates the inevitable burdens which these proceedings impose on all concerned, it believes that these burdens can best and most efficiently be discharged by complying with its orders, rather than by reiterating at length the difficulties of compliance.

The committee continues to believe that both parties as well as the Senate will benefit from a narrowing of the issues to those matters which are truly in dispute. The committee accordingly will review the stipulations proposed by the House and give careful consideration to any specific objections that it is able to identify in Judge Hastings' May 18, 1989 response and in any supplement that he may file to that response by June 1, 1989. Upon completion of its review, the committee will issue a ruling that sets forth the matters which shall be deemed to be found as true as a matter of record for purposes of the committee's evidentiary proceedings and its report to the Senate of matters that are not in dispute.

If Judge Hastings wishes to participate further in this process of distinguishing contested from uncontested issues, he may submit an additional response to the House's proposed stipulations on or before June 1, 1989. That response shall set forth for each proposed fact and each document his specific objection, or lack of objection, to each particular stipulation. In so doing, Judge Hastings should respond to each factual and documentary stipulation proposed by the House: for example, that a particular document is authentic or is a business or public record, or that a particular fact is true. He need not address whether a particular document or fact is relevant and admissible in evidence.

Although the House has referred to its "proposed stipulation[s] regarding the admissibility of a document," see page 2 supra, we agree with both parties that documentary admissions need go no further than the genuineness of the documents and, for those categories specifically identified by the House, their status as records of regularly conducted activities or public records, see Proposed Stipulations of Documents, filed December 15, 1988, at 1. Admissions concerning facts also need go only to their truth and not to their relevance.

Depositions

By its April 14, 1989 order, the committee advised Judge Hastings that it would consider his request to take pretrial depositions if he provided a list of, and certain information concerning, his proposed deponents. Judge Hastings responded with a Request for Specific Depositions, filed on May 10, 1989, in which he asked that subpoenas be issued for sixteen individuals. The House, on May 16, 1989, filed a request for the issuance of deposition subpoenas, naming three individuals.

In ruling upon these requests, unprecedented in the context of an impeachment proceeding, the committee has been guided by whether a strong showing of need has been made. In particular, the committee has considered, first, whether or not there has been an adequate showing that the deposition

could ascertain relevant evidence, and second, whether or not the parties already have a sufficient basis for trial preparation in any previous testimony by a proposed deponent.

For persons whom Judge Hastings designates as "Participants in Borders's Scheme," the committee declines to issue the requested subpoenas for Rebecca Sutton Nesline and Peter Chaconas. No showing has been made that either Rebecca Sutton Nesline or Peter Chaconas has knowledge of any matter relevant to the Articles of Impeachment. With respect to Joseph Nesline, before deciding whether a threshold showing has been made which might justify the issuance of a subpoena, the committee requests that the House make available to the committee the information in the House's possession concerning Mr. Nesline's competency as a witness.

The committee will grant Judge Hastings' request for the issuance of a subpoena to William Dredge for pretrial testimony. Although Mr. Dredge's testimony before the Eleventh Circuit Investigating Committee is available to Judge Hastings' counsel, the committee has decided to permit a pretrial examination of Mr. Dredge because Judge Hastings has argued that Mr. Dredge's testimony may be especially central to his defense. The committee requests that the parties confer with each other on arrangements for a pretrial examination of Mr. Dredge and that they advise the committee about available dates for that examination so that a subpoena

may be issued for a suitable time.

Concerning the FBI and Justice Department officials for whom Judge Hastings requests the issuance of deposition subpoenas, Judge Hastings is ordered, on or before June 1, 1989, to provide the committee with a list of the three individuals, in order of priority, whom he deems most important to depose. In compiling that list, he should be mindful of whether or not he has access to the individual's prior testimony. He should also furnish to the committee at that time any supporting information, including documentation, which supports his claim that these persons possess knowledge relevant to the Articles of Impeachment, and shows that he is in fact unable to obtain information voluntarily from those persons. The committee will then determine whether it will issue subpoenas for their pretrial examination.

With respect to the House requests, the committee declines to issue subpoenas for Marilyn Carter and Alan G. Ehrlich, both of whom have given previous testimony which is available to the House for its trial preparation. In contrast to Mr. Dredge, whose pretrial examination we will allow, there is no indication that either of these witnesses is sufficiently central to these proceedings to warrant the issuance of subpoenas for their pretrial examination. The committee has decided that a subpoena shall issue for Joanne Tyson Colt, who was a law clerk in Judge Hastings' chambers

in October of 1981, who has never previously testified, and who has refused to be interviewed by the House. The requested subpoena shall issue for her pretrial testimony after counsel for the parties have advised the committee about available dates for Ms. Colt's pretrial examination.

Conduct of Evidentiary Hearings

Pursuant to the committee's second pretrial order, issued on April 21, 1989, the committee heard from the parties at the May 18, 1989 pretrial conference on various proposals concerning the conduct of the evidentiary hearings which shall begin on July 10, 1989. To the extent that Judge Hastings' submissions to the committee should be understood to be a request to postpone those hearings, that request is denied.

One of the issues that the parties addressed, at the committee's request, was whether the evidentiary proceedings should be bifurcated to permit the taking of each party's evidence first on the bribery and perjury articles and second, after receiving all the evidence on those matters, on the wiretap disclosure article. Judge Hastings objects to bifurcation because it would require him, if he testifies, to divide his testimony into two parts. We will respect Judge Hastings' objection and will not bifurcate the evidentiary hearings. The committee will accommodate the interest of the House in deferring, if it so wishes, the portion of its

opening statement on the wiretap disclosure issue to the point in the presentation of its evidence when it is prepared to present its case on that issue.

At the May 18, 1989 conference, the parties also briefly discussed whether it would be appropriate to permit introduction of prior testimony, taken in United States v. Borders, United States v. Hastings, and before the Eleventh Circuit Investigating Committee, in place of taking live testimony before this committee. The committee believes that the use of such prior recorded testimony is desirable in certain circumstances, particularly, for example, where the testimony is not that of a key witness whose credibility is at issue, and encourages its use consonant with fairness to the parties and the development of a coherent record for use by the Senate.

Accordingly, both parties are directed to file and serve, no later than June 14, 1989, an identification of the prior testimony which, to the best of their knowledge, they in fact intend to offer into evidence. That identification shall: (1) specify the proceedings from which the proffered testimony is drawn, (2) append a copy of the proffered testimony, and (3) briefly state why the party believes that it would be appropriate to submit that particular testimony by way of prior recorded testimony rather than through a live witness. Each party shall in its pretrial statement on

June 21, 1989, state, for each such proffer of prior testimony by the opposing party, whether or not it objects to introduction of that prior testimony and, if so, the specific nature of its objections.

The parties were also invited to suggest ways in which the evidentiary proceedings could be structured to permit the taking of evidence within a three-week period of time. In response, the House suggested that the committee adopt the procedure, used by United States District Judge Pierre Laval in the Westmoreland v. CBS defamation case, of dividing a predetermined number of hours between the parties, leaving each side free to determine how its case can best be presented within the available time. Judge Hastings has not responded to the particulars of the House proposal or offered any specific proposals of his own.

The committee believes that guidelines, fairly and flexibly applied, must be adopted to facilitate realistic trial preparation and to enable the Senate and the parties to focus on matters that will be important to the Senate's disposition of the Articles of Impeachment. In framing their final pretrial statements, due on June 21, 1989, and in preparing for the evidentiary proceedings which will commence on July 10, 1989, the parties should operate within guidelines premised on the availability of eighty trial hours during the course of three weeks of hearings. Reserving several hours for miscellaneous matters, the parties should

anticipate that they will each have thirty-eight hours in which to present their evidence on all matters, dividing their time as each sees fit between direct and cross-examination. In addition, each party may present an opening statement of no longer than one hour, which, if either party wishes, may be divided into two portions.

The parties should address in their final pretrial statements of June 21, 1989, and be prepared to discuss at the pretrial conference on June 22, 1989, the amount of time which they intend to allocate to direct testimony, whether by prior or live testimony, and whether their preparation has shown that some modification of these guidelines is necessary. The committee is mindful that the foregoing guidelines may need adjustment, both before commencement of the evidentiary proceedings and in the course of those proceedings, and that there must, and will, be flexibility in their application.

An additional order providing further details about the required content of the final pretrial statements will be issued shortly.

Jeff Bingaman
Chairman

Arlen Specter
Vice Chairman

May 24, 1989